Supreme Court of the United States

OCTOBER TERM 1944

JOHN N. PRICE & SONS, a corporation,
Petitioner,

vs.

MARYLAND CASUALTY CO., a corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI.

SUPPORTING BRIEF FOR PETITIONER.

Statement of Facts.

The petitioner brought suit against the respondent in the Supreme Court of New Jersey; the case, by reason of diversity of citizenship, was removed to the United States District Court for the District of New Jersey. At the trial in that court, judgment was entered for the petitioner in the sum of $4633.45; (see opinion, R. 92A to 94A). An appeal was taken to the United States Circuit Court of Appeals for the Third Circuit and the judgment was reversed with a mandate to direct a judgment to be entered in favor of the respondent; (see opinion R. 108 to 111).

The facts concerning the controversy are briefly stated as follows:

In December, 1938, the Board of Education of the City of Paterson, and Johannsen Co. entered into a contract

under the terms of which Johannsen agreed to erect a school building for the sum of $471,800.00. The petitioner was a subcontractor who furnished labor and material for the job. The respondent, Maryland Casualty Company, was surety on the bond in the sum of $471,800.00, as required by the laws of New Jersey, (R. S. 2:60-207 etc.) and under the terms of the bond guaranteed payment of all persons, firms or corporations performing labor or supplying material in the construction of the school.

During the course of construction, Johannsen Co. received periodic payments on its contract, and in September 1940, the school was substantially completed and there was a balance of about $30,000.00, due the contractor; this sum was in fact moneys retained from payments as provided in the contract. In the course of the work, the Board paid the contractor about $440,000.00, and as a matter of fact, the only prerequisite for the release of the payments, was the production of the Architect's certificates, (R. 56A). The Board of Education was legally bound to make the final payment within 30 days after completion and upon receipt of the Architect's certificate, (contract, P-1, sec. 17 & 18).

In September, 1940, the contractor applied to the Board for the final payment. The attorney for the Board directed that the contractor furnish the Board with releases from all subcontractors. The order to obtain releases was given for the purpose of protecting the Board of Education, (R. p. 69A, lines 1 to 5). This was the first time that such a request was made and was done, not by authorization of the Board of Education, but by its attorney for the sole reason of protecting the Board of Education, (R. 69).

At this time, the Board knew that there was a debt due the petitioner; the Secretary of the Board and the Architect, in charge of the work, were told about the debt due Price, (R. 26A & 30A). Johannsen requested a release from Price. Price refused unless he was paid. Price

then consulted counsel and as a result, executed a release to Johannsen and at the same time received an escrow agreement wherein Johannsen certified that the release would not be used unless and until payment was made; at the same time, Johannsen issued a postdated check to be cashed upon receipt by him of money from the Board. Price then told Mr. Lee, the Architect and Mr. Kelly the Secretary of the Board, that he had given Johannsen a release in escrow and that he had not been paid and was assured by the Secretary that Price would be paid, (R. 29A and 30A). Price had no lien against the Board. The Board was legally obligated to pay Johannsen.

Several days later, although Johannsen received his money from the Board, he stopped payment on the Price check; after having delivered the release to the architect, contrary to the terms of the escrow agreement.

The defendant, surety company, had no knowledge of the issuance of the release, nor of any of the payments made by the Board.

The Price release as well as releases of other contractors were delivered to Mr. Lee, Architect for the Board, by Johannsen and at the time of the delivery both Lee and Johannsen knew that Price had not been paid, (R. 39A and 40A). Of all the subcontractors, Price was the only one who exacted an escrow letter.

The trial court, sitting without a jury, found as a fact, that Johannsen had a present intention to violate the terms of the escrow agreement at the time of its execution and thereby practiced a fraud and deceit upon the plaintiff; that the surety was not prejudiced, (R. 92A to 94A).

The Circuit Court reversed this judgment, relying upon another case involving the same bond, (R. pages 108 to 110) which was decided by the highest court in New Jersey, to wit, the New Jersey Court of Errors and Appeals. It is contended that the Circuit Court of Appeals erred for the reason that the facts in the case at bar were so different than in the case relied upon by the Circuit Court

of Appeals, that as a result thereof the Circuit Court improperly applied the law of the State of New Jersey to the particular case under discussion.

The Circuit Court of Appeals improperly applied the law of New Jersey, by reason of an improper review of the facts.

The Circuit Court relied upon a decision by the New Jersey Court of Errors and Appeals in the case of *Brooks-Wright* reported in 135 N. J. Eq. page 510, which decision reversed an opinion by the Court of Chancery of New Jersey, reported in 133 N. J. Eq., page 15, 29 Atl. (2nd) page 882. It is important to note the wide difference between the facts in both cases. The circumstances surrounding the delivery of the release in the *Brooks-Wright* case is stated in the opinion by the Court of Chancery, found in 133 N. J. Eq. 15, 29 Atl. (2nd) page 882, and the facts were that the release was executed by Brooks-Wright solely for the purpose of expediting the collection of money by Johannsen & Co. from the Board of Education and with the understanding that the release was not to affect the debt due to Brooks-Wright. There was no evidence in that case that the Board of Education was apprised of this fact. The case presents the ordinary situation where the owner relied upon the release in making payment to the contractor, and because of this, the Court of Errors and Appeals of New Jersey reversed the Court of Chancery and in its opinion said (R. 110):

> "The action in giving the release deprived the Board and the appellant of the security which was retained in order to insure performance. Respondent cannot make the appellant pay for its mistakes."

In the case at bar, the release was delivered to Johannsen with an express agreement that it would be held

in escrow and that it would not be delivered unless Price was paid. Before the release was delivered to the Board of Education, Price advised the Board that he was not paid and that the release did not represent payment. The trial court found as a fact that the release was obtained by fraud; that the defendant was not prejudiced by the delivery of the release, and apparently for the reason that the Board of Education knew that the release did not represent payment.

It will be observed that in the opinion of the Circuit Court, (R. 108 to 110), that Court, in a recitation of the facts in the case at bar, fails to mention the fact that the Board of Education knew that the release did not represent payment; it fails to mention the fact that the respondent here was not prejudiced by the delivery of the release to the Board since the Board knew that Price had not been paid, and that the release was being delivered contrary to the agreement of the parties.

It is suggested here that the New Jersey law is applicable on the substantive question involved, in accordance with *Erie Railroad* v. *Tompkins*, 304 U. S. 64, but it is respectfully contended that the law of New Jersey does not permit the respondent to escape liability under the facts in the case at bar. The law enunciated by the New Jersey Court of Errors and Appeals in the *Brooks-Wright* case is not applicable to the case at bar, and has been improperly relied upon by the Circuit Court.

A careful review of the factual situation in both of these cases will clearly indicate that the Circuit Court failed to comprehend the different factual situation presented in both cases which led the court in error, in its application of alleged local law.

In the New Jersey case of *Twaits* v. *Pennsylvania Railroad*, 77 N. J. Eq. 103, 75 Atl. 1010, which is a decision by the Court of Chancery of New Jersey and has been followed to date, the law is well settled that the Court of Chancery of New Jersey has jurisdiction of a suit to

restrain a defendant in an action at law, begun in a state court and removed by it to the federal court, from relying on a receipt signed by plaintiff as a release of his right of action against defendant.

Neither the position of the Board of Education nor of the surety was changed by virtue of the delivery of the release to the Board because the Board was fully acquainted with the fact that the contractor was guilty of fraud in attempting to use the release as evidence of payment, and in this situation under the law of the State of New Jersey, the petitioner could not be estopped from denying the validity of the release. The trial court in this case found as a fact that the release was not detrimental to the position of the bonding company, and application of the law of New Jersey would not justify an estoppel against the petitioner.

In the case of *Cartun* v. *Myers* (Court of Errors and Appeals of New Jersey) 82 Atl. 14, 78 N. J. Eq. 303, it is said:

> "An estoppel in pais can only arise where the parties have acted on the faith of representations made to them, or on the faith of statements, or conduct on the part of another occasioning them to change their position to their detriment."

To the same effect is the case of *O'Donnell* v. *McCann*, (Court of Chancery of New Jersey, 1910) followed to date, reported in 73 N. J. Eq., 640; 68 Atl. 752, it is said:

> "The essential elements which must unite to create an equitable estoppel by conduct are that a party in good faith relied upon the representations or conduct of the other party, and thereby was led into such a course of conduct that he will be substantially prejudiced if the other be permitted to repudiate his former action or representation."

In the case of *Cellized Floors, Inc.* v. *Glen Falls Indemnity Co.*, 9 N. J. Mis. 1111; 156 Atl. 845, at page 846, (Court of Chancery of New Jersey, 1931), the court said:

> "In order that the defendant may take advantage of the doctrine of estoppel, it must appear that the conduct of the plaintiff was either intended to deceive the defendant or was of such a nature that a reasonably prudent person would have been deceived by it; secondly, the defendant must have acted upon the conduct; and, in the third place, the defendant company must have been without knowledge of the real facts.
>
> "If it had knowledge of the truth or had means by which with reasonable diligence it could acquire knowledge, it cannot claim to have been misled by relying upon the conduct of the plaintiff. In applying these principles, two things are to be borne in mind. In the first place, no actual receipt was ever given by the plaintiff for payment alleged to have been made to it. All that was signed or executed by the Cellized Floors, Inc., was a release of liens, the effect of which was to discharge the land and buildings, and was in no wise to release Costanza Bros. from their obligation to make payment under their contract. An examination of the instrument in question discloses that fact.
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> " * * * The particular purpose of the act of the Legislature providing for an additional bond is to assure the payment of the materialmen and laborers, and there is nothing in the release that relieves the defendant company from its obligation.
>
> " * * * The mere giving of a release of liens upon the lands and building would not of itself be such an act as would discharge the defendant company, particularly where it had every opportunity to inquire as to the nature of the instrument given."

In another case, quite similar to the one under discussion, *United States* v. *Shea-Adamson Co., et als*, 21 Fed. Supp. 831 (Minn. District Court 1937, Fourth Division), the facts were these, to wit:

Minnesota Steel Supply Co. sold material to Shea-Adamson Co. for use in a post office building. Shea-Adamson was a subcontractor under N. P. Severin, the general contractor. The Royal Indemnity Co. furnished the bond. A release was executed by Minnesota Steel running to N. P. Severin and the surety company; the release also waived any lien against the building. The court ruled as follows:

> "To waive or release a lien right, it must appear to be supported by a consideration.
>
> "There was no consideration in the instant case for the release, nor does the record disclose any grounds of estoppel barring the intervener from asserting this claim. No receipt was ever given by the Minnesota Co. for the payment of the account. All that was given was a writing in the form of a release of lien on lands and buildings * * * and a release of right of claim as against the general contractor and its surety, but was in no manner a release of any claim against the Shea-Adamson Co. The release is not a bar to a recovery on this claim."

* * * * *

And at page 838:

> "As for the surety company on the general contractor's bond, it is well settled that where the principal remains bound, the surety cannot object. (See U. S. v. National Surety, 20 Fed. 2nd 972; Van Kirk v. Adler, 111 Ala. 104, 20 So. 336 also 17 Fed. Supp. 378)"

In *Van Kirk* v. *Adler,* 20 So. 336 (Alabama):

> "A surety can make no defense which the principal waives, or by his conduct precludes himself from making."

Aside from the decisions which are relied upon to indicate to this Court that the law of New Jersey will not permit a fraudulent release in defense, where there has been no change in the position of the defendant by virtue of the use of the fraudulent release, it is contended that

the very contract itself to which the respondent is necessarily bound as part of its bond, specifically provides; "No payment, however, final or otherwise shall operate to release the contractor or his sureties from any obligations under this contract or the performance bond." (Last paragraph of Section 19 of Exhibit P-1, R. page 102.)

In the New Jersey case of *Franklin Lumber Co.* v. *Globe Indemnity Co.*, 102 N. J. L. page 9, affirmed by the New Jersey Court of Errors and Appeals in 102 N. J. L. 715, it has been definitely established as the law of the State of New Jersey that a bond such as is in question here is furnished by the surety company for the benefit of subcontractors as well as for the benefit of the Board of Education.

Applying, therefore, the laws of the State of New Jersey to the situation at bar, we have a set of facts which disclose first, that a bond is given by the Maryland Casualty Co. to insure performance of a contract by Johannsen Co. and the Board of Education; and as a further condition of the bond, the Maryland Casualty Co. guaranties to pay all subcontractors, and this guaranty is specifically made for the benefit of subcontractors. Under the law of New Jersey, a person securing a release by fraud is barred from the use of that release in an effort to avoid liability upon the original claim, and in the absence of evidence that the release was acted upon in good faith to the detriment of a third party, the claim would satisfactorily be in full force and effect against the principal and the surety. It is equally the law of the State of New Jersey, that in such a situation if the position of the parties have been changed in reliance upon the release that liability could be avoided because of that change in position. The difficulty with the opinion by the Circuit Court in this case is that it disregarded the important facts in the case at bar which conclusively prove that there was no reliance upon the release in the making of the final payment and

because of this, there was no change in the position of the defendant. The Circuit Court likewise disregarded the factual finding of fraud in the obtaining of the release, and, therefore, improperly applied the case of *Brooks-Wright* v. *Maryland Casualty* quoted *supra* to the case at bar.

The question is rather an important one since as the record now stands, the opinion of the District Court discloses a situation as has been demonstrated here and because of the opinion by the Circuit Court it would appear that the laws of New Jersey did prevent recovery in a situation such as exists here even though there was no change in the position of the surety. As has already been demonstrated, such is not the law of the State of New Jersey.

It is perhaps likewise important to mention the fact that the release never became operative because of the fact that it was placed in escrow.

It is difficult to concede how the Circuit Court of Appeals could rely upon the decision in the *Brooks-Wright* case in view of the other facts which appear in this case and which do not appear in the *Brooks-Wright case.*

For example, the record here is complete concerning the issue that the Board of Education never requested a release from anyone for the protection of the surety, and as has been previously stated, the Board, under the contract in existence and the law covering it, did not need a release from any of the subcontractors in order to make payment to Johannsen. The delivery of the releases by Johannsen to the architect of the Board was in fact surplusage, and legally *nudum pactum*. This is clearly demonstrated by the evidence of Mr. Green, attorney for the Board of Education. He testified that up until the final payment (wherein money up to $440,000.00, was disbursed) the Board automatically made checks to the contractor when the architect furnished the certificate, and counsel to

the Board knew that there was no liability from the Board to any subcontractor where no claim had been filed (App. 56A), and that the Board never requested releases from anyone, and that the Board never made a specific request for releases; that the request was made by him as counsel for the Board for the purpose of protecting the materialmen, (App. 56A); that he never discussed the question of releases with the Maryland Casualty Co. and as far as he knew the Maryland never knew about the releases (App. 57A), and did not find out about it until some time later; and that the contract provided that final payment should be made to Johannsen upon production of the architect's certificate (App. 62A).

There was further proof in the case that the architect, Mr. Lee, was in charge of the work for the Board of Education, and that he was acquainted with the fact that Price had not been paid. Mr. Price testified that he told Mr. Lee the day following the signing of the release that he signed the release in escrow and that he received a post-dated check and further advised Mr. Lee that he would no re-sign the release unless he was paid, and Mr. Lee told Mr. Price that he would see to it that Price was protected in getting his money (App. 29A). Mr. Price also told Mr. Kelly, the secretary of the Board of Education, that he was not paid (App. 30A). The Board of Education, therefore, knew that Price was not paid.

With this set of facts, the fallacy of the argument by appellant is easily discernible. Nothing was done in this case to in any wise prejudice the position of the surety. The surety, as a matter of fact, relied upon the Board of Education in the making of all payments under the contract and although there was ample provision in the contract for its protection, yet it never sought to exercise it. The plaintiff did not release any security which it held, to the prejudice of the defendant, and there was no representation or statement made by Price to the Surety or its

agents which were false and which would prejudice the position of the Surety.

In view of the factual findings of the trial court, and apparently not questioned by the Circuit Court, this Court is justified in accepting the facts as found by the trial judge. In *Alabama Power Co.* v. *Ickes,* 1838, 58 Sup. Ct. 300; 302 U. S. 464, it is said:

> "Findings made after hearing by district judge on undisputed or conflicting evidence, not questioned by appellate court and not without substantial support in evidence, were accepted by the Supreme Court as unassailable."

Further Statement of Grounds on Which This Court is Asked to Assume Jurisdiction.

Petitioner relies upon Rule 5 of this Court in praying leave to invoke the jurisdiction of this Court.

First, it is contended that the Circuit Court has decided an important question of New Jersey law in a way probably in conflict with applicable New Jersey law.

It is likewise suggested that under the rules of this Court, the case presents a situation where in order to further the ends of justice there should be a review of the subject matter under discussion.

In re 620 Church St. Bldg. Corp. (Ill. 1936) 57 S. Ct. 88; 299 U. S. 24; 81 L. Ed. 16, rehearing denied 57 S. Ct. 229, 299 U. S. 623, 81 L. Ed. 458, it is said:

> "Provisions of Judicial Code that Supreme Court shall have power to issue writs not specifically provided for by statute which may be necessary for exercise of jurisdiction and agreeable to usages and principles of law held to contemplate employment of writ of certiorari in instances not covered by provision of Judicial Code authorizing issuance of writ of certiorari by Supreme Court after judgment

> or decree by Circuit Court of Appeals, as auxiliary process as means of giving full force and effect to existing appellate authority and of furthering justice."

In *Exhibit Supply Co.* v. *Ace Patents Corp.*, 315 U. S. 126, this Court, in the exercise of its discretion reviewed, after granting certiorari (314 U. S. 705) where the petition for the writ only challenged a decree of infringement below. This Court said:

> "Although there is no conflict of decision, we were moved to grant the petition by the nature of the questions presented, together with a showing that the industry affected by the patent is located in the Seventh Circuit so that litigation in other Circuits resulting in a conflict of decision would not be likely to occur."

It is strongly suggested that an injustice is being done to the petitioner solely by reason of the fact that the Circuit Court did not, in its review, comprehend the important distinguishing feature between the facts in this case and the one which they relied upon in attempting to apply the local law to the case at bar.

It is respectfully submitted that this Court in accordance with the rules of the Court and with precedent [redacted] the petition for the writ prayed for.

Respectfully submitted,

AARON HELLER,
Attorney for and of
Counsel with Petitioner,
307 Monroe Street,
Passaic, New Jersey.

Affidavit Annexed to Petition.

State of New Jersey, }
County of Passaic. } ss.:

AARON HELLER, of full age, being duly sworn, says:

1. I am familiar with the contents of the Petition and the same is true to the best of my knowledge and belief.

AARON HELLER.

Sworn to and subscribed before me
this 5th day of April 1945.
Charles Travaglio,
Attorney at Law
of New Jersey.